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No. 85-1409

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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TABLE OF AUTHORITIES

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We have demonstrated in the certiorari petition that the "severity" regulation invalidated by the court of appeals in this case has been a feature of the Social Security disability program since 1960 and is explicitly supported by the text and legislative history of the Social Security amendments of 1954, 1967, and 1984. Despite this overwhelming support for the regulation, the clear conflict in the circuits on the question of the validity of the regulation, and the broad importance of that question, respondent urges the Court to deny certiorari.

1.a. Respondent errs in contending (Br. in Opp. 4-9) that there is no circuit conflict to be resolved by this Court. The court of appeals in this case stated that it "now find[s], along with the Third and Seventh Circuits, that the regulation violates the Act" (Pet. App. 8a, citing *Johnson* v. *Heckler*,

769 F.2d 1202, 1210-1213, reh'g denied, 776 F.2d 166 (7th Cir. 1985), petition for cert. pending, No. 85-1442; *Baeder* v. *Heckler*, 768 F.2d 547, 551-553 (3d Cir. 1985)). In addition, since the time of the court of appeals' decision, the Eighth and Tenth Circuits also have invalidated the severity regulation. See *Hansen* v. *Heckler*, 783 F.2d 170 (10th Cir. 1986); *Brown* v. *Heckler*, 786 F.2d 870 (8th Cir. 1986).[1]

At the same time, the court below recognized that its holding conflicts with that of "[s]everal circuits [that] have upheld the severity regulations by construing the threshold severity showing as a 'de minimis' requirement" (Pet. App. 8a n.6). As we have explained in the certiorari petition (Pet. 22), the Fifth, Sixth and Eleventh Circuits all have held that the severity regulation, as so construed, is valid. See *Garza* v. *Heckler*, 771 F.2d 871, 873 (5th Cir. 1985); *Stone* v. *Heckler*, 752 F.2d 1099, 1101-1103 (5th Cir. 1985); *Salmi* v. *Secretary of Health & Human Services*, 774 F.2d 685, 69-692 (6th Cir. 1985); *Farris* v. *Secretary of Health & Human Services*, 773 F.2d 85, 89-90 (6th Cir. 1985); *Flynn* v. *Heckler*, 768 F.2d 1273, 1274-1275 (11th Cir. 1985); *Brady* v. *Heckler*, 724 F.2d 914, 918-920 (11th Cir. 1984). See also *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984). The First Circuit also has now sustained the regulation. See *Andrades* v. *Secretary of Health & Human Services*, No. 85-1804 (May 7, 1986).

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[1]In *Dixon* v. *Heckler*, 785 F.2d 1102 (2d Cir. 1986), a New York State-wide class action, the court affirmed a preliminary injunction barring the use of the severity regulation. However, the panel did not finally resolve the question of the validity of the regulation; instead, applying the abuse-of-discretion standard for review of the preliminary injunction (*id.* at 1106), the court was unable to conclude that the district court contravened that standard in finding that the plaintiffs had established a likelihood that they would exceed on the merits of their claim (*id.* at 1107).

Like the Ninth Circuit in this case, other courts of appeals have expressly acknowledged the existence of a circuit conflict on the question of the validity of the severity regulation. For example, the Eighth Circuit stated in *Brown*, slip op. 4-5:

> The Circuits are divided on this question. Three Circuits have accepted Brown's argument and have invalidated the provision. * * * The five other Circuits that have considered the question have refused to invalidate the second step, but have interpreted it as a de minimis, threshold requirement.

See also *Hansen*, 783 F.2d at 176 ("We decline to follow those courts which have construed the regulation to embody a de minimis standard."); *Baeder*, 768 F.2d at 553 ("other courts have directed the Secretary to apply the regulation only to bar claims of those with *de minimis* medical complaints"); *Salmi*, 774 F.2d at 689 n.3 (noting conflict with *Johnson* and *Baeder*).

b. Respondent argues (Br. in Opp. 4-5, 8), however, that there is no circuit conflict because all of the courts of appeals have disapproved of the Secretary's practices with regard to the severity step and the invalidation of the regulation in this and other cases presents only a question of "remedy." This effort to avoid what the courts of appeals themselves identify as a conflict in their rulings is unavailing.

The Secretary made clear when the severity regulation was promulgated in its existing form in 1978 that it was not intended to "alter the level[] of severity for a finding of * * * not disabled on the basis of medical considerations alone" and that the regulation addresses impairments that "have such a minimal effect on the individual that they would not be expected to interfere with his or her ability to work, irrespective of his or her age, education, and work

experience" (43 Fed. Reg. 9296, 58353 (1978)). The Secretary reiterated this interpretation of the regulation in Social Security Ruling (SSR) 85-28 (reproduced at Pet. App. 37a-44a), which was published in November 1985 to ensure that the severity regulation is properly applied at step 2 of the sequential evaluation process. The courts that have sustained the regulation have given it the same interpretation, even while disapproving the application of the regulation in particular cases. See, *e.g.*, *Andrades*, slip op. 4; *Salmi*, 774 F.2d at 690-692; *Stone*, 752 F.2d at 1101-1103, 1106; *Brady*, 724 F.2d at 1274-1275. By contrast, the Ninth Circuit in this case explicitly *declined* to adopt an interpretation of the regulation as applying to "slight" or "de minimis" impairments, concluding instead that the regulation itself is altogether invalid (Pet. App. 8a-9a n.6, 11a).

2. Contrary to respondent's contention (Br. in Opp. 10-11), there is no need for factual development in district court. The only issue before this Court is whether the severity regulation is invalid on its face. That is a question of law, and as respondent concedes (*id.* at 10), "[t]he Ninth Circuit's analysis is based on solely legal grounds." If the Court sustains the regulation against respondent's facial challenge, questions regarding its application in particular factual circumstances can be resolved as they arise.

Respondent also errs in suggesting (Br. in Opp. 11-12) that an internal study of the severity step conducted by the Social Security Administration counsels against granting certiorari in this case. See Associate Commisssioner for Disability, Social Security Administration, *Report on the Not Severe Case Study* (Mar. 14, 1986) [hereinafter cited as *Report*].[2] In fact, however, that study reinforces the need for review by this Court, because it concludes that the

[2]We have lodged a copy of the *Report* with the Clerk of this Court.

severity step of the sequential evaluation process is "crucial to consistent decisionmaking" (*id.* at 13). The study was undertaken prior to the implementation of regulatory and legislative changes (such as the requirement that multiple impairments be considered, see Pet. 17-20) and prior to the issuance of SSR 85-28. Thus, although respondent quotes the passage in the final *Report* that there was "misunderstanding [on the part of the state agencies] regarding the threshold level of not severe cases" (Br. in Opp. 11, quoting *Report* at 6), she fails to point out that the Report states that SSR 85-28 was promulgated for the very purpose of eliminating that confusion. *Report* 7, 8-9, 12, 13. In other words, the *Report* and SSR 85-28 were intended to ensure that the severity regulation is properly *applied*. This case presents the distinct, threshold question of whether the regulation is valid *on its face*. The holding by the court below and other courts that it is not warrants review by this Court.

3. Respondent makes little effort to rebut our showing (Pet. 11-21) that the court of appeals plainly erred on the merits. Since the commencement of the disability program in 1954, both Congress and the Secretary have made clear that benefits may be denied on the basis of medical factors alone. Respondent does not even advert to the text or legislative history of the Social Security Amendments of 1954, ch. 1206, § 106(d), 68 Stat. 1080, in which the statutory definition of the term "disability" in 42 U.S.C. 423(a)(1)(D) and 1382(a) was first enacted. As we have explained (Pet. 11-12), the committee reports on the 1954 amendments make clear that a claimant may be required to demonstrate that he has a "medically determinable impairment of serious proportions" before it is necessary for the decision-maker to decide whether he is unable to work by reason of that impairment. H.R. Rep. 1698, 83d Cong., 2d Sess. 23 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 21 (1954).

Moreover, although respondent does cite (Br. in Opp. 13-14) the committee reports on the 1967 amendments, she does not acknowledge the portions of those reports, quoted in the certiorari petition (Pet. 15), which state that a person may be found disabled "only if it is shown that he has a severe medically determinable physical or mental impairment or impairments." S. Rep. 744, 90th Cong., 1st Sess. 48 (1967); H.R. Rep. 544, 90th Cong., 1st Sess. 30 (1967). This legislative history is particularly significant in view of the fact that then-existing regulations *already* provided that benefits could be denied on medical grounds alone. See Pet. 13. Respondent asserts (Br. in Opp. 13) that the more stringent requirements in the 1967 amendments were enacted only as a result of holdings by some courts that a claimant was disabled because the work he was able to perform was unavailable in the geographical area or because he was unlikely to be hired for jobs he could do. But this assertion ignores the statements in the committee reports that Congress also was responding to judicial rulings regarding "the kind of evidence necessary to establish the existence and *severity* of an impairment" and that the amendments were intended to "reemphasize the predominant importance of *medical* factors in the disability determination" (S. Rep. 744, *supra*, at 48; H.R. Rep. 544, *supra*, at 29-30) (emphasis added)).

Equally unavailing is respondent's attempt to explain the amendments made by the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*, as nothing more than a requirement that the Secretary discontinue the policy of declining to consider the combined effect of non-severe impairments. See Br. in Opp. 14. Respondent's submission ignores the obvious fact that the combined effect of impairments is important principally in the application of the severity regulation that the Ninth Circuit invalidated in this case. And the text of the 1984 Act

establishes that Congress ratified the existence of that regulation. It directs the Secretary (i) to consider the combined effect of a claimant's impairments in determining whether they are of "sufficient *medical severity*" even to be the basis for eligibility, and (ii) if he finds a "*medically severe* combination of impairments," to consider the combined effect of such impairments "throughout the disability determination process" (§ 4, 98 Stat. 1800-1801 (emphasis added)). Furthermore, as we have explained (Pet. 18-20), the legislative history of the 1984 Act makes unambiguously clear that Congress contemplated the continued application of the severity step of the sequential evaluation process. The court of appeals failed to respect that deliberate judgment by Congress.

4. The question of the validity of the severity regulation is of broad importance in the administration of the Social Security disability programs, because the sequential evaluation process contemplates that the regulation will be applied as a screening measure to *every* claimant who is not already engaged in substantial gainful activity. Approximately two million such claims are filed each year. It is essential for the Secretary, state agency adjudicators, and claimants to know whether the severity regulation can be validly applied to those claims. It also is important for this Court to resolve the widespread litigation in the lower courts regarding the validity of the regulation. See Pet. 21-23.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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